15-1046(L) & 15-1103

ORAL ARGUMENT REQUESTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BIG RIDGE, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/ CROSS-RESPONDENT BIG RIDGE, INC.

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STATUTES

RULES

I. THE BOARD DID NOT HAVE JURISDICTION TO "CONSIDER THE CASE ANEW"

The Board does not dispute that, when the underlying administrative record was filed with this Court, it lost jurisdiction and this Court acquired *exclusive* jurisdiction over this proceeding. Instead, the Board claims it reacquired jurisdiction following the Court's 2014 decision arguing that when this Court concluded "The cross-petitions of the Board for enforcement of its orders are DENIED," it actually meant "REMANDED FOR FURTHER PROCEEDINGS."

This Court's disposition of other procedurally challenged Board orders does not support the Board's reading. *NLRB v. Greensburg Mfg., LLC*, 189 L.R.R.M. 2992 (7th Cir. 2010) ("The order granting the application for summary entry of the NLRB judgment and the accompanying judgment are VACATED. This case is REMANDED to the NLRB for further proceedings in light of the Supreme Court's decision in *[New Process Steel]*."); *Rochelle Waste Disposal, LLC v. NLRB*, 189 L.R.R.M. 2064 (7th Cir. 2010) ("The cases are REMANDED to the National Labor Relations Board for further proceedings."); *Sheehy Enterprizes, Inc. v. NLRB*, 188 L.R.R.M. 3472 (7th Cir. 2010) ("In light of [*New Process Steel],* the Board's decision at a time when it had only two Members was ineffectual. The Board now has a full complement of five Members. The matter is therefore remanded to the National Labor Relations Board so that a properly constituted panel can resolve this dispute."); *NLRB v. Spurlino Materials*, 189 L.R.R.M. 2064

(7th Cir. 2010) ("These petitions are REMANDED to the National Labor Relations Board for further proceedings in light of the Supreme Court's decision in *[New Process Steel]*."); *NLRB v. E.A. Sween Co.*, 188 L.R.R.M. 3472 (7th Cir. 2010) ("This case is REMANDED to the National Labor Relations Board in light of the Supreme Court's recent decision in *[New Process Steel]*.").

Undaunted, the Board claims that it can read a remand into the decision here because: (i) the Court's failure to deny enforcement on the "merits" means the Court likely contemplated further administrative proceedings and therefore implicitly "relinquished jurisdiction" back to the Board; (ii) the overwhelming case law on this issue, including Supreme Court precedent, is not inconsistent with the Board's position; and (iii) justice requires this Court treat its order as a remand. None of these arguments have merit.

A. The Mandate Cannot Reasonably Be Construed As A Remand To The Board

1. Plain Language Of The Mandate

This Court interprets the plain language of its judgments and mandates *de novo*, and the Board's interpretation is not entitled to deference. *Pennington v. Doherty*, 110 F.3d 502, 506 (7th Cir. 1997) ("To the extent that the submissions of the parties require us to determine whether the district court, in formulating a methodology for its inquiry, correctly interpreted the mandate . . . the question is one of law, and our review is de novo."), vacated on other grounds by *Doherty v.*

Pennington, 522 U.S. 909 (1997). It is academic that when interpreting the mandate, the first place the Court turns is to the language of the mandate itself. *See Phillips Petroleum Co. v. FERC*, 902 F.2d 795, 800 (10th Cir. 1990)("we first turn to the language of the . . . mandate.")

Interpretation of the mandate here is a simple exercise. The Court's order states: "[W]e GRANT the petitions for review and VACATE the Board's orders in both cases. We also DENY the cross-petitions of the Board for enforcement of its orders." *Big Ridge, Inc. & FTS Internat'l Proppants, LLC v. NLRB*, 561 Fed. Appx. 563 (7th Cir. 2014). Its final judgment states: "The petitions for review are GRANTED and the Board's orders in both cases are VACATED. The cross-petitions of the Board for enforcement of its orders are DENIED." There is nothing in the Court's words to misconstrue. The operative documents make no mention of a remand, let alone use language even contemplating remand.

Despite the Court's plain language relaying its conclusions and the omission of any reference to a remand, the Board argues that "a remand need not be explicitly ordered for the Board to consider the case anew." (Br. at 27.) However experience teaches that if the Court intended to remand, it would have explicitly said so. This point is confirmed by the Court's denial of the Board's express request for a remand.

As discussed fully in Big Ridge's Opening Brief, the Fourth Circuit has addressed this exact issue and held that the Board lacked authority to conduct further proceedings following a denial of enforcement where the court never remanded. (Company Br. 24-26.) When the Board argued in a reconsideration motion that it reasonably construed the court's mandate as an implicit remand, the court could not have been more clear that in absence of remand language, there is no remand:

> While the Board contends that our decision constituted some sort of remand, **nowhere in our opinion did we so indicate**…it is unusual that the Board would have interpreted our disposition as implicitly providing such a remedy… As we explained in our order…the Board had no such authority.

NLRB v. Lundy Packing Co., No. 95-1364(L), 1996 WL 685196, at *1 (4th Cir. Mar. 21, 1996) (emphasis added).

The Board also argues that "the Court's 'judgment and decree' enabled the Board to continue processing the case after the Court's mandate relinquished its exclusive jurisdiction." (Br. 33.) This contention is nothing more than a recast of its original posture that the Court's final order somehow remanded the case back to the Board. Yet again, nothing in the Court's final judgment even suggests that the Court "relinquished" its exclusive jurisdiction to the Board or granted the Board jurisdiction to continue to process the case. Nor does the Board cite to any case law or statute that holds upon entry of a final order of an appellate court and in

absence of a remand, the appellate court "relinquishes" its exclusive jurisdiction back to the lower tribunal.

2. The Board's Misplaced Reliance On *Ford Motor v. NLRB*

The Board's argument that Big Ridge is wrong in claiming that Section 10(e) does not authorize this Court to remand wholly misconstrues the Company's position. (Br. 32 n.9.) Big Ridge does not argue that the Court was not authorized to remand under Section 10(e) but, instead, that this Court is not obligated under the Act to remand. (Company Br. 19-21.) The point of the Company's argument is to illustrate that the language of Section 10(e) – which lacks reference to obligatory remands – does not support the Board's position that this Court must remand.

Having misconstrued the Company's argument, the Board attacks this misconstruction by relying on *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) for the proposition that a circuit court has the equity power to remand even in absence of statutory authority. (Br. 32 n.9.) While this proposition may be true – and one that Big Ridge has never disputed – *Ford* also held that the Board did not have the authority to withdraw its petition for review once the transcript was filed with the appellate court because jurisdiction had already vested exclusively with the court. Thus, *Ford* supports the premise that the Board loses its ability to act with respect to a matter over which the circuit court has exclusive jurisdiction,

even if the Board merely seeks to abandon an action the Board itself had commenced.

Ford therefore illustrates the jurisdictional principle that the Board cannot simply take back a case to correct a procedural issue whenever it chooses. Moreover, the *Ford* Court's holding accords with the notion – which the Supreme Court made explicit four years later in *Eagle-Picher Mining & Smelting Co. v. NLRB*, 325 U.S. 335(1945) – that the power to remand is within the appellate court's discretion:

> There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure . . . or supplying findings validly made in place of those attacked as invalid.

Id. at 375 (emphasis added).

When faced with a request for remand in *Ford*, the appellate court granted the motion, permitting the Board to conduct further proceedings to correct its procedural errors. When faced with a request for remand here, this Court denied the motion, thereby terminating the proceedings in their entirety. *Ford* comes nowhere close to holding that an administrative agency, under these circumstances, is entitled "to consider the case anew" at its own discretion or direction.

3. Judicial Practice Following *New Process Steel* And *Noel Canning* Refutes The Board's Position

The Board asserts its reading of the mandate is supported by the manner in which other appellate courts handled their dockets following the Supreme Court's rulings in *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010) and *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). It suggests that the general practice of appellate courts has been to remand pending cases back to the Board for further consideration post *New Process* and *Noel Canning*, (Br. at 34 & n.11; 35 & n.12), and suggests this Court should interpret its mandate in light of this practice.

But in *each and every* case cited by the Board, following both *New Process Steel*[1] and *Noel Canning*[2], the reviewing court *explicitly* remanded the case to the

[1] *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213 and 08-1240, 2010 U.S. App. LEXIS 19619, at *1 (D.C. Cir. Sept. 20, 2010) (ordering "the case [to be] remanded for further proceedings before the Board"); *Northeastern Land Servs. v. NLRB*, Case No. 08-1878, 2010 U.S. App. LEXIS 19257, at *1 (1st Cir. July 30, 2010) ("[T]he case is remanded to the Board"); *Cnty. Waste of Ulster, LLC v. NLRB*, 385 F. App'x 11, 12 (2d Cir. 2010) ("[T]he case is REMANDED for further proceedings"); *J.S. Carambola, LLP v. NLRB*, Case Nos. 08-4729 and 09-1035, 2010 U.S. App. LEXIS 20988, at *1 (3d Cir. July 1, 2010) (granting an "Unopposed Motion by the National Labor Relations Board Requesting a Full Remand of the case to the Board for Further Consideration"); *Diversified Enter., Inc. v. NLRB*, Case No. 09-1464, 2010 U.S. App. LEXIS 18131, at *1 (4th Cir. July 23, 2010) ("[T]he Court grants the motion and remands the case to the National Labor Relations Board for proceedings consistent with the holding in [*New Process Steel*]."); *Bentonite Performance Mineral LLC v. NLRB*, 382 F. App'x 402, 403 (5th Cir. 2010) ("Accordingly, we vacate the Board's order and remand for further proceedings consistent with this opinion."); *Galicks, Inc. v. NLRB*, 383 F. App'x 516, 516 (6th Cir. 2010) ("In light of the Supreme Court's decision in *New Process Steel*, we *sua sponte* REMAND for proceedings

consistent with that opinion."); *NLRB v. Spurlino Materials, LLC*, Case Nos. 09-2426 & 09-2468, 2010 U.S. App. LEXIS 19049, at *2 (7th Cir. July 8, 2010) ("These petitions are REMANDED to the National Labor Relations Board for further proceedings in light of [*New Process Steel*]."); *Leiferman Enters., LLC v. NLRB*, Case Nos. 09-3721 & 09-3905, 2010 U.S. App. LEXIS 19048, at *1 (8th Cir. July 8, 2010) ("The National Labor Relations Board's motion to remand this matter to the Board for further consideration in light of [*New Process Steel*] is granted."); *NLRB v. Legacy Health Sys.*, Case No. 09-73383, 2010 U.S. App. LEXIS 19222, at *1 (9th Cir. July 9, 2010) ("Petitioner's unopposed motion to remand this matter to the National Labor Relations Board is granted."); *Teamsters Local Union No. 523 v. NLRB*, 624 F.3d 1321, 1322 (10th Cir. 2010) ("Therefore, we VACATE the Board's order and REMAND to the Board for further proceedings."); *CSS Healthcare Servs., Inc. v. NLRB*, Case Nos. 10-10568 & 10-10914, 2010 U.S. App. LEXIS 19236, at *1 (11th Cir. July 16, 2010) ("The NLRB's January 29, 2010, Decision and Order is VACATED in its entirety and this matter is REMANDED IN FULL to the NLRB for further consideration in light of [*New Process Steel*].").

[2] *See, e.g.*, *Oak Harbor Freight Lines, Inc. v. NLRB*, 2014 U.S. App. LEXIS 14879, at *2 (D.C. Cir. Aug. 1, 2014) ("The decision of the National Labor Relations Board is vacated and the case remanded to the Board for further proceedings"); *NLRB v. Instituto Socio-Economico Comunitario, Inc.*, Case No. 13-1688, CM/ECF Doc. No. 00116747555, at *1 (1st Cir. Oct. 3, 2014) ("The Board's decision and order is hereby vacated, and the case is remanded for further proceedings consistent with this opinion"); *NLRB v. Dover Hospitality Servs.*, Case No. 13-2307, 2014 U.S. App. LEXIS 15169, at *1 (2d Cir. Jul. 2, 2014) ("It is hereby ORDERED that the [Board's] motion [to vacate and remand] is GRANTED and this case is hereby REMANDED to the NLRB with the mandate to issue expeditiously"); *NLRB v. Salem Hosp. Corp.*, 2014 U.S. App. LEXIS 14265, at *1 (3d Cir. Jul. 10, 2014) ("[T]he NLRB's order is hereby vacated and the case remanded to the NLRB for further proceedings consistent with [*Noel Canning*]"); *NLRB v. Nestle Dreyer's Ice Cream Co.*, Case No. 12-1783 (4th Cir. July 29, 2014) ("The court vacates the Board's order and remands the case to the Board for further consideration in light of the Supreme Court's decision in *NLRB v. Noel Canning*…); *Dresser-Rand Co. v. NLRB*, 576 F. App'x 332, 334 (5th Cir. 2014) ("[T]he order of the Board is VACATED, and the case is REMANDED to the Board for further proceedings consistent with this opinion"); *Little River Band of Ottawa Indians Tribal Gov't v. NLRB*, Case Nos. 13-1464 & 1583, CM/ECF Doc. No. 128-2 in Case No. 13-1464, at *1 (6th Cir. Aug. 13, 2014) ("The Board's

Board. These rulings only support Big Ridge's position - not undermine it as the Board argues - that when an appellate court intends to remand, it typically says so.

B. Relevant Case Law

1. The Board's Failed Attempt To Distinguish Cases Cited by Big Ridge

The Board attempts to distinguish case law cited by Big Ridge on the grounds that, in these cases, the courts denied enforcement "on the merits." Here, the Court's denial of enforcement was on "procedural" grounds. Thus, in the Board's view, these cases do not foreclose its expansive reading of the Court's mandate. (Br. 28-29.)

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order is VACATED and this matter is REMANDED for further consideration in light of *Noel Canning*"); *Contemporary Cars, Inc. v. NLRB*, Case Nos. 12-3764 & 13-1066, CM/ECF Doc. 21 in Case No. 12-3764, at *2 (7th Cir. Oct. 3, 2014) ("The National Labor Relations Board's order is VACATED and this case is REMANDED to the Board for further proceedings in light of [*Noel Canning*]"); *Relco Locomotives, Inc. v. NLRB*, Case Nos. 13-2722 & 13-2812, Judgment (no CM/ECF docket number available) (8th Cir. Jul. 1, 2014) ("The National Labor Relations Board's unopposed motion to vacate its order in this matter and remand the case for further proceedings is granted"); *DIRECTV Holdings, LLC v. NLRB,* 2014 U.S. App. LEXIS 14374, at *2 (9th Cir. Jul. 2, 2014) ("The unopposed motion of the National Labor Relations Board ('the Board') to vacate the Boards final order and remand to the Board in light of [*Noel Canning*] is GRANTED"); *Int'l Union of Operating Engineers, Local 627 v. NLRB*, Case Nos. 13-9547 & 13-9564, 2014 U.S. App. LEXIS 14273, at *2 (10th Cir. Jul. 2, 2014) ("[T]hese cases are remanded to the NLRB for further proceedings consistent with the Supreme Court's decision in *Noel Canning*"); *NLRB v. Gaylord Chem. Co*., Case Nos. 12-15404 & 12-15690, Order (no CM/ECF docket number available) (11th Cir. Aug. 13, 2014) ("The NLRB's . . . Decision and Order is VACATED in its entirety, and this matter is REMANDED IN FULL to the NLRB for further consideration in light of *Noel Canning*").

Yet, the Board's argument is doubly flawed. First and foremost, this type of mandate parsing has already been rejected by the Supreme Court. *See Eagle-Picher Mining & Smelting Co. v. NLRB*, 325 U.S. at 344 ("There is nothing in the Act to indicate that [a Board] decree is dual in character -- part of it final and part of it subject to vacation and reexamination by the Board regardless of the showing made to the court and regardless of the view the court holds as to the propriety of such vacation."). The Board fails to reconcile its restrictive reading of these cases with the Supreme Court's rejection of such practice in *Eagle-Picher*.

Second, nothing in the cases cited by Big Ridge suggest that their holdings were limited to Board orders that were denied enforcement for substantive reasons. If anything, these cases compel the opposite conclusion. *See NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26 (4th Cir. 1996) ("absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court"). These cases are clear that the Board cannot simply reassume jurisdiction of a case absent a remand, regardless of the reason for the Court's disposition of the matter.

Section 10(e), once invoked, extinguished the Board's jurisdiction over the proceedings. That is the unifying principle in *Eagle-Picher* and the rest of the cases cited in the Company's Opening Brief. These cases make clear that the Board cannot unilaterally modify a decision once jurisdiction vests with the

appellate court. That observation is completely consistent with – indeed, it depends on – the rule in *Eagle-Picher* that when an unfair labor practice record is filed in an appellate court pursuant to Section 10(e), the Board loses jurisdiction over the entire matter. And, once an appellate court enters final judgment, absent remand, the "case is closed in *all* respects." *Lundy,* 81 F.3d at 27 (emphasis added). [3] Thus, the Board is simply wrong when it concludes that the "exceptions are still pending before the Board, and the Board is free to address them." (JA 1278; Br. 25.)

2. ***Whitesell*** **Is A Red Herring**

The Board makes much of the Eighth Circuit's decision in *NLRB v. Whitesell*, 638 F.3d 883 (8th Cir. 2001), claiming that this Court should follow its lead. *Whitesell* is nothing more than a red herring and plainly conflicts with the Supreme Court's opinion in *Eagle-Picher*. Thus, *Whitesell* should have no bearing on the present Petition.

[3] The Board's citation to *Costello v. United States*, 365 U.S. 265, 285 (1961) is unavailing. (Br. 33.) *Costello* interprets language in Fed.R.Civ.P. 41(b), which governs when involuntary dismissal of a lawsuit operates as an adjudication on the merits, thereby barring a *subsequent action*. Rule 41(b) does not address when the *same action* may be revived by a lower tribunal once disposed of by a final order of a higher court. Nor does it address whether an administrative agency can unilaterally seize jurisdiction from a circuit court once that matter has properly vested within that circuit court's sole jurisdiction. And certainly, nothing in Rule 41(b) has any bearing on appellate jurisdiction over Board orders under Section 10(e) of the Act.

Moreover, *Whitesell* is simply not persuasive. The Eighth Circuit's actions in that case run contrary to its prior decision in *W.L. Miller Company v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993). The Board attempts to distinguish *W.L. Miller* by arguing that the *Whitesell* Court denied enforcement based on a procedural error, whereas *W.L. Miller* was based on a substantive error. But the *Whitesell* Court failed to acknowledge *W.L. Miller* at all in its opinion. Therefore, the Board's argument that *Whitesell* is based on a distinction between a substantive and procedural error is pure speculation and unsupported by *Whitesell's* text.

And glaringly absent in the Board's defense of *Whitesell* is the Eighth Circuit's failure to address how its holding can be harmonized with the Board's divestiture of jurisdiction by reason of Section 10(e); instead, the Board simply notes the court's general citation to 10(e), albeit to address a different issue, as if that somehow resolves the disconnect. (Br. 30.) *Whitesell* also fails to address how it comports with binding Supreme Court precedent that an appellate decree that enforces or denies a Board order cannot be read, as the Board suggests, as being "final" in some respects, but not others. *See Eagle-Picher*, 325 U.S. at 343-44 ("There is nothing in the Act to indicate that such a decree is dual in character; part of it final and part of it subject to vacation and reexamination by the Board…"). The Board is correct on one point: that this present case cannot be squared with the *Whitesell* decision. (Br. 29.) But that is because *Whitesell* is

simply wrong: it runs contrary to the law of the Supreme Court, the law of its own circuit and to the plain language of Section 10(e).

C. The Board's Contention This Court Should Find Jurisdiction In The Interest Of Fairness Is Unpersuasive

Finally, the Board argues this Court should allow the Board "to consider the case anew" because failing to do so would result in injustice. The Board cites *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), arguing that "a finding of legal error does not foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." Presumably, the Board believes that regardless of statutory language or legal precedent, it should be able to reissue its decision in order to preserve justice. However, the Board fails to mention that in *Pottsville* the appellate court remanded the matter back to the administrative agency so that it would have the jurisdiction to "enforce its legislative policy." *Id*. Indeed, the decision's immediately preceding sentence illustrates that the Supreme Court specifically contemplated that any further enforcement of the legislative policy would only occur after a remand to the administrative agency: "on review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction." *Id*. (emphasis added).

Pottsville actually stands for the opposite of the Board's "ends justify the means" approach to jurisdiction. Indeed, the Supreme Court admonished the appellate court for exceeding its authority in an attempt to reach a "fair" result:

> It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the court is not conducive to the development of habits of responsibility in administrative agencies.

Id. at 146 (internal citations omitted).

Thus, when reviewing the plain language of the mandate, this Court's denial of the Board's motion for remand, and well-established and reasoned legal precedent, it is beyond clear that this Court's 2014 decision did not remand these proceedings back to the Board. The Board therefore was without jurisdiction to issue the unfair labor practice order. Enforcement must be denied on that basis.

II. WALLER'S TERMINATION DID NOT VIOLATE SECTION 8(a)(3)

While the majority of the Board's brief is nothing more than a spin on Waller's behavior – justifying his actions while diminishing their severity where convenient – a few points are worth mentioning. First, the Board still fails to locate one shred of evidence that either 1) ties the decision makers, Benner and Gossman, to the alleged anti-union animus, or 2) substantiates a causal connection

between the Company's alleged anti-union animus and Benner and Gossman's decision to terminate Waller. Second, while the Board argues that the ALJ's finding is well supported by circumstantial evidence, this "evidence" is based on nothing more than half-truths and unreasonable inferences.

A. No Record Evidence Supports a Finding that the Decision Makers Were Motivated by Anti-Union Animus

As an initial matter, the Board attempts to dodge the relevant inquiry into the decision makers' motives by arguing that the "Company" had anti-union animus and the "Company" committed certain actions. However, the focal point of the inquiry into Waller's termination must be on the decision makers—Benner and Gossman. *See NLRB v. Louis A. Weiss Memorial Hosp.*, 172 F.3d 432, 443-44 (7th Cir. 1999). Tellingly, the Board's brief fails to acknowledge that the ALJ never made any finding of antiunion animus with respect to either Benner or Gossman and, in fact, specifically rejected allegations of unlawful promises by Benner. (JA0021-22.)

Sidestepping this gaping void, the Board instead argues that Benner and Gossman's simple *knowledge* of Waller's union activity coupled with the "Company's" alleged mischaracterization of the flagging incident demonstrates that the decision to discharge Waller was unlawfully motivated. However, no record evidence exists to support a finding that either Gossman or Benner "fabricated" or "twisted" the evidence before them regarding Waller's behavior.

Nor does the evidence show that either Gossman or Benner considered Waller's Union support when they made the decision to terminate his employment. Instead, the record evidence unequivocally demonstrates that Benner and Gossman, in deciding to terminate Waller, reasonably relied on all of the evidence collected by Gossman, via first-hand witnesses. (Company Br. 55-58.)

In light of the Company's burden to show only that its decision makers had a reasonable belief that the employee committed the offense (instead of proving that the employee did in fact commit the offense), the Board argues that neither Benner nor Gossman really believed that Koerner was actually threatened by Waller's actions. To support this argument, the Board contorts a few minor pieces of evidence, such as Waller's ram car was not moving at the time of the incident – a fact that has no bearing on the Company's finding that Waller intentionally ignored the feeder watcher's directive to stop. Moreover, the Board tellingly makes no mention of three vital pieces of undisputed evidence that show, as a direct result of his run-in with Waller, Koerner was afraid for his safety: (1) Koerner immediately reported the incident to his shift leader and changed his work pattern for the remainder of the night; (2) the day following the incident, Koerner, still scared to go underground, reported the incident to the mine manager and was moved to a different above ground position; and (3) Koerner suffered two severe anxiety attacks, one which required immediate on-site EMT attention and another that

required him to be admitted to the hospital and treated for anxiety and depression. (JA0532-33.) Given this undisputed evidence, coupled with the accounts of no less than seven witnesses, Benner and Gossman were entitled to reasonably believe that Waller had engaged in the dangerous and threatening behavior of which he was accused.

B. The Circumstantial Evidence On Which The Board Relies Is Based On Unreasonable Inferences and Not On The Substantial Record Evidence

Because no record evidence exists that either Gossman or Benner harbored anti-union animus, or that alleged anti-union animus played a role in their decision to terminate Waller, the Board attempts to rely on circumstantial evidence to justify the ALJ's 8(a)(3) finding. Yet this alleged circumstantial evidence, even if it does exist, does not reasonably lead to an inference that Waller was unlawfully terminated.

1. The Company Did Not Present "Shifting" Reasons for Terminating Waller

A constant theme of the Board's brief is that Big Ridge has presented inconsistent reasons for discharging Waller and therefore these "shifting" explanations support the ALJ's finding of unlawful termination. However, as recounted in detail in the Company's opening brief, both Gossman and Benner testified that all of the instances evidenced in Gossman's written statements, and as reported to Benner, formed the basis for the decision to terminate Waller. They

both testified that, in light of all the evidence before them, they were most concerned 1) about the flagging incident and 2) that the complaints about Waller were not limited to one isolated event but were based on multiple events that appeared to be escalating. (JA010-92, JA0215, JA0595-99, JA0616.)

The Board further argues that these reasons are nothing more than the Company's post hoc attempt to justify Waller's termination. The Board, citing *Jet Star, Inc. v. NLRB*, 209 F.3d 671 (7th Cir. 2000), supports this argument by contending that the Company failed to investigate the allegations against Waller, failed to get his side of the story or to warn him about the potential consequences of his misconduct, and instead summarily terminated him. However, the undisputed record evidence shows just the opposite. At the outset, Lawrence immediately spoke with Waller about his behavior. Not only did Lawrence give Waller an opportunity to explain his side of the flagging incident, but he also warned Waller about his behavior. (JA0072.) In fact, when Lawrence presented Waller with the opportunity to explain his side of the story, Waller reaffirmed the complaints against him by dismissing the severity of his actions and by becoming so loud and agitated with Lawrence that Lawrence had to instruct Waller to calm down. (JA0088, JA0331, JA0579.) Lawrence reported to Gossman what occurred during his meeting with Waller. (JA0228, JA0577.)

Furthermore, Gossman conducted his own investigation into the multiple reports he had received concerning Waller and, in doing so, interviewed and/or took written statements from at least seven witnesses, including Lawrence. (JA167-72, JA0178-89, JA199-00, JA0228.) Gossman then presented this evidence to other Company officials including Benner. (JA0140-41, JA0159-60.) The decision to terminate Waller was not pre-determined as suggested by the Board. Based on all of the evidence presented by Gossman, Benner instructed Gossman to interview Waller regarding the reports of his threatening and unsafe behavior and that unless Waller revealed any new information to Gossman, other than the flat out denial he gave Lawrence, Gossman was to terminate Waller's employment. (JA0616.) When Waller failed to provide Gossman with any new information, Gossman terminated Waller's employment as instructed by Benner. (JA016, JA1023.)

2. Other Employees Cited by the Board Were Not "Comparators"

The Board further argues that Big Ridge's failure to punish more serious misconduct by other employees likewise supports the ALJ's findings with respect to Waller's discharge. However, the Board's characterization of Waller's misconduct is self-serving and supported by neither the record evidence nor common sense. First, the Board claims that Waller's conduct was not as severe as that of other employees. Yet, the record evidence is undisputed that these

instances of threats were isolated—in other words, the perpetrators had no previous record of making such threats, nor was there any evidence that they did so again. Moreover, unlike the Board's "comparators," Waller not only repeatedly threatened his fellow co-workers but did in fact follow through on the one threat deemed to be the most alarming to both Benner and Gossman – that "[Koerner] could flag him as much as [he] wants, [he's] not going to stop" and that "he wouldn't stop for nothing." (JA0515-19.)

However, the Board contends that "while BRI may be technically correct that employees may not 'ignore feeder signals,' BRI's workplace reality belies any suggestion that doing so is a basis for discharge." (Br. 50.) Unlike the behaviors cited by the Board in its brief, Big Ridge had no latitude to condone Waller's behavior; it was a direct violation of a mandated MSHA safety procedure and had potentially catastrophic consequences, of which the Company was all too aware. Furthermore, there is no record evidence to suggest there is anything "technical" about Big Ridge's contention that ram car operators may not "ignore feeder signals" – it is an absolute duty of the position. (JA0201, JA0551.)

3. Waller's Length of Service in the Coal Industry and Willingness To Work Overtime Has No Bearing on His Present Behavior

The Board also contends that because the ALJ found Waller to be "hard-working, experienced, dependable, well-liked and willing to fill in on his days off,"

the Company is more likely to have terminated Waller for an unlawful reason. (Br. 43.) However, this contention glosses over the reason for Waller's termination. While some record evidence may support the ALJ's finding as to Waller's employment history in general, Waller was not terminated for work performance, lack of experience, or for his unwillingness to earn overtime. Instead, shortly before he was terminated, Waller started down a path of confrontational and dangerous conduct; the record is replete with uncontradicted evidence, including admissions by Waller himself, that he engaged in such conduct. Also, the record shows that the more Waller confronted his fellow employees, the more egregious his behavior became. To advocate that Waller is untouchable now because of his once "hard working" reputation garners a result that is neither logical nor supported by legal precedent. Indeed, in none of the cases cited by the Board do the courts advocate automatic immunity for an employee's dangerous behavior simply because he was an experienced employee and worked overtime.

4. The Company's Decision Not To Petition This Court For Review On Other Charges Has No Bearing On The Petition Before This Court

Finally, the Board contends that it is more likely than not that Big Ridge unlawfully terminated Waller because it did not challenge the ALJ's finding of guilt on other unfair labor practice charges alleged against it. However, such an argument illogically presumes that the Company's decision not to challenge the

adverse ruling was based on the Company's assumption of guilt. Yet, such a presumption is unreasonable. Big Ridge contested the Union's allegations surrounding the Company's pre-election conduct to the Regional Director, the ALJ and in its exceptions to the Board. In fact, the Company lodged its own objections to the Union's election conduct and vehemently pursued these allegations through the Board process as well. Only when the Company was faced with an adverse ruling by the full Board, did it make a calculated *business* decision that the best interests of both the Company and its employees would better be served by moving forward with the Union in an effort to begin the building of a productive working relationship. Incredulously, the Board's theory advanced in its brief penalizes the Company for doing exactly what the Board ordered it to do.

Contrary to the election objections, the Company simply could not allow the Board's decision with respect to Waller's termination to go unchallenged. The Company has steadfastly maintained that Waller's behavior directly threatened the safety of its employees and greatly compromised its legal obligations under MSHA. To have turned a blind eye to Waller's misconduct in the face of a legal challenge would have put the employees' safety and the Company's regulatory obligations at significant risk, as well as send a dangerous message to its employees about its tolerance for such conduct.

Moreover, if this Court is to view this petition "through the lens" of the ALJ's findings, then it must consider the fact that the ALJ specifically found that Benner, one of the two decision makers in the Waller termination, did not make unlawful promises as alleged by the Union in its objections. (JA0021-22.) Following the Board's logic, given the Board's failure to challenge the ALJ's finding with respect to Benner, coupled with the ALJ's lack of findings with respect to Gossman, it is more likely than not that Benner and Gossman did not unlawfully terminate Waller.

III. CONCLUSION

For the reasons cited herein and in its opening brief, Big Ridge's Petition for Review should be granted and the Board's Cross-Application should be denied.

Respectfully submitted,

/s/Gregory B. Robertson

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ADDENDUM

Pursuant to Rule 28 of the Federal Rules of Appellate Procedure, Petitioner/Cross-Respondent sets forth below the relevant portions of the following statutes and authorities upon which it relies in its Reply Brief:

1. National Labor Relations Act, Section 8(a)(3), 29 U.S.C. § 158(a)(3)
2. National Labor Relations Act, Section 10(e), 29 U.S.C. §160(e)
3. Federal Rules of Civil Procedure, Rule 41(b)
4. *NLRB v. Lundy Packing Co*., No. 95-1364(L), 1996 WL 685196, at *1 (4th Cir. Mar. 21, 1996)

National Labor Relations Act

Section 8(a)(3), 29 U.S.C. § 158(a)(3)

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer]

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

National Labor Relations Act

Section 10(e), 29 U.S.C. §160(e)

(e) [Petition to court for enforcement of order; proceedings; review of judgment]

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Federal Rules of Civil Procedure
Rule 41(b)

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

1996 WL 685196
Only the Westlaw citation is currently available.
United States Court of Appeals, Fourth Circuit.

NATIONAL LABOR RELATIONS BOARD;,
Petitioner,
United Food & Commercial Workers, Local 204, AFL-CIO; International Union of Operating Engineers, Local 465, AFL-CIO, Intervenors,
v.
LUNDY PACKING COMPANY, Respondent.
In re LUNDY PACKING COMPANY, INCORPORATED, Petitioner.

No. 95-1364(L), 96-1177, 12-CA-16618. | March 21, 1996.

ORDER

***1** Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B. v. Lundy Packing Co.,* 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright,* disposing of the petition on the basis of the Board's improper bargaining unit determination.

While the Board contends that our decision constituted some sort of remand, nowhere in our opinion did we so indicate. Moreover, given that the Board did not request or even suggest a remand in its initial submissions to this court, it is unusual that the Board would have interpreted our disposition as implicitly providing such a remedy. And if the Board possessed legitimate questions about the outcome of this case, those questions should have been raised in a timely petition for rehearing. Yet the Board did not file such a petition for rehearing.

When the Board makes a timely request for a remand to count disputed ballots, it enables the court to inquire in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay. *See N.L.R.B. v. Long Island College Hospital,* 20 F.3d 76, 83 (2nd Cir. 1994) ("Because of the great delay, the extraordinary Board and employee turnover ... and the fact that the majority of the present employees did not vote in the relevant election, this case presents unique circumstances that warrant denial of enforcement of the bargaining order"). Instead, the Board acted in clear contravention of its jurisdictional limits and sought to bypass this court. While the Board calls our attention to an order issued in *BB&L, Inc. v. N.L.R.B.* (93-1479) (D.C. Cir. 1995), there, the Board requested a remand in a timely petition for rehearing, and the court saw fit to enter an order prescribing that a particular ballot be counted. Hence, the Board's actions in *BB&L, Inc.* were pursuant to a properly obtained court order. Here, in contrast, the Board did not even request a remand and simply proceeded to conduct further proceedings on its own initiative. As we explained in our order of February 15, 1996, the Board had no such authority.

The court reiterates its respect for the Board's role in the area of national labor relations law. The court expects in turn respect for the its process and its mandates. The court denies the motion for reconsideration of its order of February 15.

Entered at the direction of Chief Judge WILKINSON, with the concurrence of Judge NIEMEYER and Judge HAMILTON.

End of Document

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

No. 15-1046(L) & 15-1103
Big Ridge, Inc. v. National Labor Relations Board

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(1) or 32(a)(7)(B) because:

   This brief contains 5,866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Circuit Rule 32(b) and type style requirements of Fed. R. App. P. 32(a)(6) because:

   This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font in Times New Roman style.

s/ Gregory B. Robertson
Attorney for Petitioner
Big Ridge, Inc.
Dated: June 10, 2015

STATEMENT OF REQUIRED MATERIALS

No. 15-1046(L) & 15-1103
Big Ridge, Inc. v. National Labor Relations Board

Pursuant to Circuit Rule 30(d), Petitioner Big Ridge, Inc. certifies that all materials required by Federal Rule of Appellate Procedure 30 and Circuit Rule 30(a) and (b) are included within its Joint Appendix.

s/ Gregory B. Robertson
Attorney for Petitioner
Big Ridge, Inc.
Dated: June 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2015, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

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